

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 28, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP323-CR

Cir. Ct. No. 2010CF2

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GREGORY E. D'AMICO,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Rusk County:
STEVEN R. CRAY, Judge. *Affirmed.*

Before Sherman, Blanchard and Kloppenburg, JJ.

¶1 PER CURIAM. Gregory D'Amico appeals two related criminal judgments entered upon his pleas of no contest. The sole issue on appeal is

whether D’Amico’s confession to police should have been suppressed.¹ We conclude that any error in refusing to suppress D’Amico’s confession was harmless, and therefore affirm the judgments of conviction.

BACKGROUND

¶2 The State charged D’Amico with three crimes—attempted first-degree intentional homicide as an act of domestic violence, burglary of a dwelling, and pointing a firearm at another—all stemming from a fight that culminated with D’Amico following his estranged wife into a neighbor’s house, where she had run seeking assistance, and shooting her in the head with a rifle.

¶3 The victim testified at the preliminary hearing that she was visiting D’Amico’s home to deliver Christmas presents to their children and have D’Amico work on her car. When she was ready to leave, D’Amico told her he wanted her to come to the bedroom. She refused. D’Amico then went into the bedroom himself and came out with a rifle. As one of the children pleaded with D’Amico not to hurt his mother and another attempted to call the police, the victim took the opportunity to leave the trailer. She entered a neighbor’s house seeking help, but D’Amico shoved his way in after her as she attempted to bar the door. D’Amico then pushed her down in front of a couch, said, “[T]his is what you deserve,” and shot her in the head.

¶4 D’Amico’s mother informed the police that D’Amico called her after the shooting and told her that he had shot the victim, was in trouble, and had ruined his life.

¹ WISCONSIN STAT. § 971.31(10) (2011-12) provides that a plea does not waive appellate review of a suppression ruling. All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

¶5 D’Amico turned himself into police later that evening. After several people observed that D’Amico appeared disheveled, disoriented, and confused, he was placed on suicide watch. He was later taken to a room in the sheriff’s department for a police interrogation, which lasted from 11:00 p.m. to 1:48 a.m. He was read his rights as required by *Miranda v. Arizona*, 384 U.S. 436 (1966), and he eventually signed the form waiving his rights.

¶6 D’Amico then gave a statement in which he admitted that he had argued with the victim when she did not want to talk to him. D’Amico said multiple times that he did not remember retrieving the rifle and did not know why he had the gun, but remembered that he followed the victim outside, down the road, and into a neighbor’s house. D’Amico claimed that he came in and grabbed the victim’s arm to get her out of the neighbor’s house, but that he tripped on something in the dark and the gun went off. D’Amico also repeatedly stated that he did not have any intention of shooting the victim, and did not remember actually pulling the trigger.

¶7 For the purpose of this opinion, we will assume without deciding that D’Amico’s confession was not knowingly and voluntarily given. The question before us then becomes whether D’Amico was prejudiced by the circuit court’s refusal to suppress the confession or whether the error was harmless.

STANDARD OF REVIEW

¶8 Application of the harmless error doctrine presents a question of law subject to de novo appellate review. *Weborg v. Jenny*, 2012 WI 67, ¶43, 341 Wis. 2d 668, 816 N.W.2d 191.

DISCUSSION

¶9 When the State claims that an erroneous suppression ruling in a criminal case was harmless error, it bears the burden of showing beyond a reasonable doubt that the objectionable evidence did not contribute to the result of the case. *State v. Rockette*, 2005 WI App 205, ¶¶25-26, 287 Wis. 2d 257, 704 N.W.2d 382. In a plea situation, the analysis centers on the incentives the defendant had to either enter a plea or go to trial, taking into account factors such as the importance of the erroneously admitted evidence, whether the evidence was corroborated or duplicated by untainted evidence, the nature of the defense, and the overall strength of the State's case. *Id.*, ¶¶26-27 (citing *State v. Hale*, 2005 WI 7, ¶61, 277 Wis. 2d 593, 691 N.W.2d 637).

¶10 Although neither of the parties has identified the correct legal standard and burden of proof for assessing harmless error in the context of a plea, many of the factors that they address in their briefs are relevant. Given our de novo standard of review, we will independently apply the relevant factors to the facts of the case.

¶11 First, the importance of D'Amico's confession to the State's case was limited to some degree by the fact that he adamantly denied in the confession to having any intention to shoot the victim. If the matter had gone to trial and a jury had credited D'Amico's statement to police that the gun had gone off after he tripped, D'Amico presumably would not have been convicted of attempted intentional homicide.

¶12 Second, to the extent that D'Amico's confession included admissions that he had argued with the victim, followed her out of the house with a rifle, and ultimately shot her in a neighbor's house, the State already had

abundant other evidence to establish each of those points. In addition to the eyewitness testimony of the victim and the two teenaged children and the admission that D'Amico made to his own mother, the State would have had forensic evidence from the neighbor's house and the rifle recovered from D'Amico's house. In other words, most of D'Amico's confession was corroborated and duplicated by untainted evidence.

¶13 Third, because the victim's assertions that D'Amico had followed her with a rifle and shot her in a neighbor's house were corroborated by the other testimony and forensic evidence, the only plausible defense would be to challenge the element of D'Amico's mental state at the time of the shooting. However, as D'Amico acknowledges in his reply brief, the statements that he made during his interrogation would not have precluded him raising a defense either that the shooting was accidental, or that he should not be held mentally responsible.

¶14 In sum, the state had a very strong case against D'Amico, and the admission of D'Amico's confession neither added much new material information about what had happened that night nor precluded D'Amico from raising a defense. Additionally, we note that the State dropped the burglary charge with a potential sentence of twelve and a half years, and agreed to limit its sentencing recommendation in exchange for D'Amico's pleas to the homicide and firearm counts. It is therefore difficult to see how the circuit court's suppression ruling could have had any significant impact on D'Amico's decision to enter a plea bargain, and we are satisfied beyond a reasonable doubt that any error was harmless.

By the Court.—Judgments affirmed.

This opinion will not be published. *See* WIS. STAT. RULE
809.23(1)(b)5.

